

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2005-000478-001 DT

12/21/2005

HON. MARGARET H. DOWNIE

CLERK OF THE COURT
L. Rasmussen
Deputy

FILED: 12/22/2005

MONTE DAVID POLLARD

CHRISTOPHER L MAY

v.

ARIZONA DEPARTMENT OF REAL ESTATE
(001)
ELAINE RICHARDSON (001)

RANDY D DELGADO

OFFICE OF ADMINISTRATIVE
HEARINGS

ADMINISTRATIVE REVIEW RULING

8:35 a.m. This is the time set for oral argument re: administrative review. Plaintiff is represented by counsel Christopher L. May. Defendant is represented by counsel Randy D. Delgado.

Court reporter Monica Hill is present.

Oral argument is presented.

IT IS ORDERED taking this matter under advisement.

8:50 a.m. Hearing concludes.

LATER:

Plaintiff Monte David Pollard (hereafter, "plaintiff" or "Pollard") appeals from a decision by defendant Arizona Department of Real Estate (hereafter, "Department") denying renewal of his real estate salesperson's license.¹ This court has jurisdiction pursuant to the Administrative Review Act, A.R.S. §§ 12-901 *et seq.* The court has considered the record from the administrative agency, as well as the memoranda and the arguments of counsel.

¹ Plaintiff does not appeal from the Department's decision to deny his original application for a broker's license.

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Factual and Procedural Background

Plaintiff filed an application for an original real estate broker's license with the Department. He also applied for renewal of his real estate salesperson's license. On March 18, 2005, the Department denied both applications based on plaintiff's employment of an unlicensed salesperson or associate broker; numerous criminal convictions; a probation violation; and failure to report certain convictions as required.

Plaintiff filed a timely appeal of the Department's denials. Administrative Law Judge (hereafter, "ALJ") Lewis Kowal held an evidentiary hearing on January 3, 2005 and January 27, 2005. On February 15, 2005, the ALJ issued findings of fact, conclusions of law, and a recommended order. He recommended that the Department deny plaintiff's application for a broker's license, impose a \$2000 civil penalty, and grant plaintiff's salesperson license renewal subject to a number of conditions. Thereafter, in a decision dated March 18, 2005, the Department's Real Estate Commissioner, Elaine Richardson, reversed the ALJ's recommendation that plaintiff's salesperson license be renewed. Specifically, the Commissioner:

- Adopted the ALJ's findings of fact 1-20.
- Adopted the ALJ's conclusions of law 1-17.
- Adopted the first sentence of the ALJ's conclusion of law 18, but rejected the remainder of the conclusion of law for the reason that plaintiff "has not satisfactorily demonstrated that he is a person of honesty, truthfulness, and good character."
- Found that plaintiff's "criminal history and his conduct which led to this proceeding demonstrate that he does not possess the requisite honesty, truthfulness and good moral character to hold a real estate broker's or salesperson's license."

Plaintiff filed a motion for rehearing, which the Department denied. He thereafter filed a timely complaint for administrative review in this court.

Analysis

A.R.S. § 12-910(E) defines the appropriate scope of judicial review:

The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

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In determining the propriety of an administrative agency's action, the court reviews the record to determine whether there has been "unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Petras v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981), *quoting Tucson Public Schools, District No. 1 of Pima County v. Green*, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972). The appellate court views the evidence in the light most favorable to upholding the agency's decision and will affirm if the decision is supported by any reasonable interpretation of the record. *See Baca v. Arizona Dept. of Economic Security*, 191 Ariz. 43, 951 P.2d 1235 (App. 1998). The court does not function as a "super agency" and may not substitute its own judgment for that of the agency where factual questions and agency expertise are involved. *See DeGroot v. Arizona Racing Comm'n*, 141 Ariz. 331, 686 P.2d 1301 (App. 1984). This court, however, is not bound by an agency's conclusions of law or statutory interpretations. *Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 807 P.2d 1136 (App. 1991).

A.R.S. § 41-1092.08(B) specifically grants the Commissioner the authority to accept, reject, or modify an ALJ's recommended decision. Viewing the record in the light most favorable to upholding the agency's decision, the court cannot find "unreasoning action, without consideration and in disregard for facts and circumstances." At best, there is room for two opinions about the proper result (i.e., the conclusion reached by the ALJ versus the determination of the Real Estate Commissioner). This court does not function as a "tie-breaker" by determining which conclusion it prefers. Rather, it decides whether any reasonable interpretation of the record supports the agency's final decision. *See Smith v. Arizona Long Term Care System*, 207 Ariz. 217, 84 P.3d 482 (App. 2004) (correct standard of review following AHCCCS Director's reversal of ALJ decision was whether *Director's* decision was supported by substantial evidence, not whether ALJ's decision was). That standard is amply met in the case at bar.

The record supports the ALJ's findings that plaintiff: (1) employed an unlicensed salesperson or associate broker in violation of A.R.S. § 32-2153(A)(6); (2) violated state laws that involve violence against another person in violation of A.R.S. § 32-2153(B)(10); and (3) failed to disclose his 2001 misdemeanor convictions within 10 days, as required by A.A.C. R4-28-301(F), in violation of A.R.S. § 32-2153(A)(3). As such, a pattern of misconduct was established. This pattern makes the credibility or demeanor of a particular witness a much less compelling factor than when a single, isolated incident is at issue. Moreover, it is not as if the Commissioner reversed a factual finding by the ALJ that plaintiff possessed the requisite honesty, truthfulness, and good moral character. As the Department stresses in its answering brief, the ALJ in fact found that "the Department has sufficient cause to question whether Mr. Pollard is a person of honesty, truthfulness, and of good moral character. Consequently, grounds exist upon which the Renewal Application could be denied." *ALJ Conclusion of Law 18*. On

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such a record, it is not “unreasonable action” to conclude that plaintiff should not be re-licensed as a real estate salesperson.

Finally, plaintiff’s due process arguments are without merit. Plaintiff was provided with notice of the charges and a full and fair opportunity to respond and cross-examine witnesses.

Conclusion

The Board’s decision is supported by substantial evidence and is not contrary to law, arbitrary, capricious, or an abuse of discretion.

IT IS ORDERED affirming the decision of the Arizona Department of Real Estate. Plaintiff’s requested relief is denied.

IT IS FURTHER ORDERED denying plaintiff’s Motion for Reconsideration filed on December 6, 2005.

IT IS FURTHER ORDERED lifting the stay of the agency decision previously imposed by minute entry dated July 11, 2005.

/s/ Margaret H. Downie
HON. MARGARET H. DOWNIE